IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

RSA.No. 1006 of 2007()

AS.131/2003 of II ADDL. DISTRICT COURT, PALAKKAD
OS.13/1995 of SUB COURT, OTTAPPALAM

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: APPELLANTS/APPELLANT -D2 & 28th RESPONDENT IN APPELLATE COURT/RESPONDENTS 1 TO 27 IN AS

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1. MANI @ VELAYUDHAN, S/O.CHERIYA CHAMI,
   ARAKURUSSI AMSOM AND DESOM, MANNARKKAD TALUK.

2. BALAKRISHNAN, S/O.VELAYUDHAN,
   PEZHINJALAM, ARAKURUSSI, MANNARKKAD TALUK.

BY ADV. SRI.M.P.SREEKRISHNAN
SMT.SHAHNA KARTHIKEYAN
SRI.V.ARUN

RESPONDENTS: RESPONDENTS 1 TO 27/PLAINTIFFS AND DEFENDANTS 3 TO 25 IN TRIAL.

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1. VASUDEVAN, RESIDING AT ARAKURUSSI
   AMSOM AND DESOM, MANNARKKAD.

2. VASAN @ RAVUNNI, DO.

3. MEENAKSHI, DO.

4. UNNIKRISHNAN @ SUNDARAN,
   RESPONDENTS 1 TO 4 ARE THE CHILDREN OF NAVU
   @ THATHA.

5. LAKSHMI, D/O.CHERIYA CHAMI, DO.

6. VESU @ JANAKI, DO.

7. RAGHAVAN, DO.

8. MALU @ KARTHYANI, DO.

9. DAKSHAYANI, DO.

10. SETHUMADHAVAN, DO.

11. SUBHADRA @ ECHU, DO.
RESPONDENTS 6 TO 11 ARE THE CHILDREN OF DECEASED DEVAYANI.

12. AMINIA, D/O.MANCHERI VEETTIL ABDULKHADER.

13. MOIDEEN, S/O.PARAPURATH ABOOBACKER, DO.

14. ABDHU, S/O.PARAPURATH ABOOBACKER.

15. SUHARA, D/O.AKKARAPARAMBIL KUNHAMMU, DO.

16. JAMEELA, D/O.CHENGODAN MOHAMMADALI, DO.

17. ABDU, S/O.PADUVAN AYAMMED, DO.

18. SAFIYA, D/O.KELATHODY ABU, DO.

19. MUHAMMEDALI, S/O.PONNASSERY USMAN, DO.

20. NOUSHAD, S/O.KURICHAN MOHAMMED @ ABDU, DO.

21. SHOUKKATHALI, DO.

22. ANITHA, DO.

23. ABU @ KURICHAN MOHAMMED, DO.

24. HAMSAKUTTY, PARAYIL, DO.

25. SHOUKATHALI, S/O.KURUKKAL ABU @ MUHAMMED KURUKKAL, DO.

26. AZEEZ, S/O.DO.

27. GOPALAN, S/O.LATE CHEERU, DO.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 29/11/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

ORDER ON I.A. 2159/2007 IN RSA NO.1006/2007

29.11.2007 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO.1006 OF 2007

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Dated this the 29th day of November, 2007

JUDGMENT

Second defendant in O.S.13/1995 on the file of Sub Court, Ottapalam and 28th respondent on the file District Court are the appellants. Respondents 1 to 4 are plaintiffs and other respondents are the defendants in the suit. The suit was filed for partition and separation of the shares of plaintiffs. Plaint B schedule property admittedly originally belonged to Nair veedu of Mannarkad. Case of plaintiffs that it was obtained on oral lease by mother Meenakshi and on the death of Meenakshi, her right devolved on deceased daughter Navu @ Thatha defendants 1 to 3, Devayani and Ammunni. Defendants 4 to 9 are the legal heirs of Ammunni who was subsequently converted to Islam. Plaintiffs contended that right of Ammunni was got released by second defendant appellant under Ext.A1 assignment deed on 23.12.1969 and the rights of

Navu @ Thatha devolved on plaintiffs and they are entitled to the share. Appellant alone resisted the suit. Appellant contended that plaint schedule property is not available for partition and O.S.81/1988 was earlier filed by plaintiffs which was dismissed and therefore suit is barred by resjudicata. It was also contended that there was no oral lease in favour of Meenakshi and plaint B schedule property was obtained by first appellant on oral lease even before 1964 and since then first appellant has been in possession of plaint schedule property and while so he has purchased jenm right from the Land Tribunal as per order in O.A.213/1970 and though the extent of the property shown in the purchase certificate was 66 cents, the actual extent is only 46 cents. Appellant also contended that Ammunni had executed Ext.A1 release deed as she was embraced Islam religion and had some quarrel with Muslim people and there was a settlement and in the settlement it was decided to give Rs.200/- to Ammunni and to avoid unnecessary

trouble the release deed was obtained and respondents are not entitled to claim any right on the recitals in Ext.A1. It was therefore contended that plaint schedule property is not available for partition. Appellant also contended that under assignment deed dated 18.6.1988 second respondent transferred the right in favour of defendants 14 and 15 who were subsequently impleaded. They filed written statement contending that they purchased the property from the appellant and the property originally belonged to first appellant and subsequent to the purchase they constructed a terrace building, latrine, bathroom and also contructed compound wall and even if it is found that plaint schedule property is partible, the building constructed by them including the latrine and bathroom are to be reserved in their favour.

2. Learned Munsiff on the evidence of PW1, DW1 and Exts.A1, B1(a) to B4, granted a preliminary decree holding that plaint B schedule property was obtained not by second respondent by but Meenakshi

on oral lease from landlord and therefore it is available for all the legal heirs of Meenakshi including plaintiffs, legal heirs of daughter Navu @ Thatha. Finding that under Ext.A1 appellant has also obtained the share of Ammunni it was found that he is entitled to 2/6 shares and defendants 4 to 9 together are entitled to 1/6 share. Appellant challenged the preliminary decree before District Court, Palakkad in A.S.131/2003. Learned District Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel is that when the claim of plaintiffs was that lease was obtained by the mother Meenakshi, appellants claim that the property was obtained on lease by first appellant. Therefore the dispute is with regard to the rival tenancy and in such circumstance courts below should have referred the question of tenancy

to the Land Tribunal under section 125(3) of Kerala Land Reforms Act and as it was not referred, the judgment is not sustainable. Learned counsel also argued that under Ext.B3 purchase certificate first appellant obtained jenm right of the property upholding the oral lease set up by first appellant and there is no case for the plaintiffs that Ext.B3 purchase certificate is vitiated by fraud and therefore Ext.B3 is binding on the plaintiffs also and when under Ext.B3 first appellant has title to the plaint schedule property, it should have been found that it is not available for partition. Learned counsel also argued that appellants are prepared to produce the order of the Land Tribunal as it is with the counsel and for the non-production of order of the Land Tribunal, claim of appellant cannot be rejected. Learned counsel also argued that there is no evidence to prove the oral lease in favour of mother Meenakshi and the recital in Ext.A1 should not have been relied on by courts below as it was got executed in a peculiar

circumstances when the executant of Ext.A1 was converted into Islam and dispute arose on account of conversion. It is therefore argued that the judgment is not sustainable.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal.

6. Partition and share in the plaint schedule property was sought on the allegation that plaint schedule property was obtained on lease by Meenakshi. Admittedly plaint schedule property originally belonged in jenm right of Nair veedu of Mannarkad and there was an oral lease. When plaintiffs contended that the oral lease was in favour of Meenakshi the mother, first appellant contended that it was not so and oral lease was in his favour. The crucial question therefore is whether the oral lease was obtained by mother Meenakshi or by her son first appellant? Being an oral lease, one cannot expect any documentary evidence to prove the existence of the lease.

Courts below relied upon Ext.A1 in the absence of other material evidence to decide whether lease was in favour of Meenakshi or first appellant. Ext.A1 is a registered release deed executed by Ammunni, one of the sisters of first appellant in favour of first appellant. As rightly found by courts below the recitals in Ext.A1 establish that plaint B schedule property was obtained on oral lease by Meenakshi. Ext.A1 shows that on the death of Meenakshi, that tenancy right devolved on all the children and under Ext.A1 first appellant purchased the rights of one of the sisters namely Ammunni. The argument of learned counsel is that Ext.A1 was executed when the executant of Ext.A1 was converted into Islam and there was a quarrel with regard to the said conversion. What is pleaded in the written statement was that after the quarrel there was a mediation and Rs.200/- had to be paid to Ammunni and Ext.A1 was executed. If there was no oral lease in favour of Meenakshi, on the death of Meenakshi the executant of Ext.A1 will

not derive any right in which case no right can be purchased under Ext.A1. So also, if the oral lease was not in favour of the mother, but in favour of first appellant, he would not have purchased the rights of Ammunni admitting that the oral lease was in favour of Meenakshi and on the death of Meenakshi it devolved on all children. Therefore as rightly found by courts below, Ext.A1 cuts the very root of the case of the appellants that there was no oral lease in favour of Meenakshi and instead the oral lease was in favour of first appellant.

7. Though learned counsel vehemently argued that as Ext.B3 purchase certificate was obtained by appellant and the property exclusively belongs to appellant, if there is no oral lease in his favour and the oral lease was in favour of Meenakshi, the mother even if the purchase certificate was obtained by one son, it shall enure to the benefit of all the legal heirs. There is no necessity to attack Ext.B3 on the ground that it is fraud. Even

if there is no specific case that Ext.B3 was obtained for and on behalf of all the legal heirs of Meenakshi, the legal effect of a purchase certificate obtained by one of the co-owners in respect of the co-ownership property which devolved on the appellant and others, is that it shall enure to the benefit of all. In such circumstance, I find no substantial question of law involved in the appeal. Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006